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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/581,380	06/01/2006	Robertus Martinus M. Diks	F7743(V)	3881

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EXAMINER

SMITH, PRESTON

ART UNIT	PAPER NUMBER
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1782

NOTIFICATION DATE	DELIVERY MODE
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01/27/2012

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

Office Action Summary	Application No. 10/581,380	Applicant(s) DIKS ET AL.	
	Examiner PRESTON SMITH	Art Unit 1782	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 January 2012.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on ____; the restriction requirement and election have been incorporated into this action.
- 4) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 5) ☒ Claim(s) 1-5 and 11-18 is/are pending in the application.
- 5a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 6) ☐ Claim(s) ____ is/are allowed.
- 7) ☒ Claim(s) 1-5 and 11-18 is/are rejected.
- 8) ☐ Claim(s) ____ is/are objected to.
- 9) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 10) ☐ The specification is objected to by the Examiner.
- 11) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 12) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-5,11-15,17-18 rejected under 35 U.S.C. 103(a) as being unpatentable over Alexander Sher, US-Patent 6,468,576 in view of Jaun Gonzalez, US-Patent 6,146,672 and Niklaus Meister, US-Patent 6,060,105.

Regarding claims 1-5,14-15,17-18, Sher teaches an emulsion having about 2-4 % weight milk protein (column 4, lines 37-38), 0.1-5wt% emulsifier (column 2, line 22), 2-6 % vegetable oil (column 5, line 25. Vegetable oils are known sources of phytosterols). The emulsifiers may be monoglycerides, diglycerides, lecithin, or combinations thereof (column 2, line 49).

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Sher fails to teach sterilizing the emulsion and the emulsifier having an HLB below 16.

Referring to the HLB, Gonzalez teaches that monoglycerides, diglycerides, lecithin commonly have HLBs of 5 or less (column 2, line 24). Sher teaches emulsifiers such as be monoglycerides, diglycerides, lecithin, or combinations thereof as mentioned previously. It would have been obvious to look to Gonzalez for HLB values for emulsifiers commonly used in foods since Sher does not specify the HLB values. Additionally, in light of Gonzalez, it is considered that the claimed emulsifier range would have been obvious and discoverable through routine experimentation. One of ordinary skill would have been motivated to adjust the HLB depending on the desired properties of the emulsion of the composite invention.

Referring to sterilizing the composition, Meister teaches that it's well known in the art to sterilize milk compositions at temperatures of 120-145 C (column 2, line 54). Sher teaches preferably raising to 170-175F (column 3, line 45) but not to sterilization temperatures. It would have been obvious to further sterilize the composition of Sher in light of Meister since this would reduce microbial growth thus extending shelf life and make the composition safer.

Referring to the suspension having a viscosity of from 2-100 mPaS at a temperature between 5 and 25 C and a shear rate of 100 Hz, the composition of Sher has a viscosity of 150 cP-2000 cP or 0.15 mPaS-2mPaS at room temperature (column 2, line 34). Viscosity is strongly dependent on temperature and decreasing temperature would increase viscosity. The viscosity of applicant is thus considered obvious and

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discoverable by routine experimentation in light of Sher. It is unclear how the claimed "shear rate" term would alter the range of Sher however absent a showing that the claimed "shear rate" would substantially change the range of Sher such that the claimed viscosity would not be obvious in light of Sher, it appears that the viscosity limitation is obvious in light of Sher.

Regarding claim 11, Sher teaches thickeners such as kappa carrageenans in an amount of 0.01-0.03% (column 2, line 46).

Regarding claim 12, Sher teaches 6 months (column 9, line 25).

Regarding claim 13, in light of the emulsifier range taught by Sher (0.1-5%, the ranges overlap), it is considered this range would have been obvious and discoverable through routine experimentation.

Claim 16 rejected under 35 U.S.C. 103(a) as being unpatentable over Alexander Sher, US-Patent 6,468,576 in view of Jaun Gonzalez, US-Patent 6,146,672, Niklaus Meister, US-Patent 6,060,105, and Shin Koike, US-PGPub 2003/0054082.

Regarding claim 16, the references teach the invention of claim 1 however the references fail to further teach the composition having 0.2-4 wt% phytosterol ester.

Koike teaches that it is well known to add phytosterol esters in an amount of 0.05-20% to foods in order to reduce cholesterol and improve the healthiness of foods. It would have been obvious to add phytosterol esters to the composition of the composite invention discussed previously since this would improve the healthiness of the food. Also, in light of the range taught by Koike, one of ordinary skill would have found the claimed range obvious and discoverable through routine experimentation.

Response to Arguments

Applicant's arguments filed 01/12/2012 have been fully considered but they are not persuasive.

Applicant argues that the office points to no teaching of sterilizing the present aqueous suspension having 0.5-10% protein and 0.1-8% fat. Sher teaches an emulsion having about 2-4 % weight milk protein (column 4, lines 37-38), 0.1-5wt% emulsifier (column 2, line 22), 2-6 % vegetable oil (fat). Meister teaches that it's well known in the art to sterilize milk compositions at temperatures of 120-145 C (column 2, line 54). It would have been obvious to further sterilize the composition of Sher in light of Meister since this would reduce microbial growth thus extending shelf life and make the composition safer. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to PRESTON SMITH whose telephone number is (571)270-7084. The examiner can normally be reached on Mon-Th 6:00-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on (571)272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Drew E Becker/
Primary Examiner, Art Unit 1782

prs